

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 142 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

MUSALMAN GANI HUSEN

Appearance:

MR KC SHAH APP for Petitioner

MR NITIN M AMIN for Respondent No. 1, 2

CORAM : MR.JUSTICE S.M.SONI

Date of decision: 12/02/98

ORAL JUDGEMENT

State has filed this appeal against the judgment and order of acquittal dated 2nd December, 1989, passed by learned Judicial Magistrate, First Class, Viramgam, in Summary Case No.1126 of 1987, wherein, respondents were charged under Section 65 (A) and 81 of the Bombay Prohibition Act. Learned Magistrate has acquitted the accused as prosecution failed to prove beyond reasonable doubt that the accused was possessed of article,

possession of which is prohibited under the Act.

2. If this would have been the fact there did not appear to have any reason even to admit this appeal. Further, there is some technical flow in the proceedings before the trial Court. After the evidence of panchas was over, learned APP gave an application Exh.14 to the effect that the facts stated in the complaint makes out an offence under Section 8 and 20 of the Narcotic Drugs and Psychotropic Substance Act (NDPS Act for short) and the case be committed to the Court of Sessions as such offence is triable by court of Sessions. Learned Magistrate had granted the said application. However, said application was granted without hearing the accused. Accused then gave an application Ex.16 to set aside that order and the same was fixed for hearing. Thereafter, on 11th September, 1989, by further order below Exh.14, same came to be rejected. The learned Magistrate then decided the matter under the Prohibition Act only, having refused to commit the case for trial under the NDPS Act to the Court of Sessions.

3. Once the facts makes out a case under the act which is exclusively triable by Court of Sessions, learned Magistrate has no jurisdiction to try the same. As soon as it was brought to the notice of the learned Magistrate by learned APP, it was incumbent on the learned Magistrate to stop to proceed further and take necessary action to commit the case to the court of competent jurisdiction. In my opinion, this is an irregularity which cannot be cured. This irregularity affects adversely the order of acquittal and the same is without jurisdiction. The order is liable to be set aside.

4. Though the order passed by learned Magistrate is without jurisdiction this court do not find it fit to interfere in the facts and circumstances of this case.

5. If the order is set aside, this Court shall have to remand the case to the court of Magistrate with a direction to proceed further in accordance with law having set aside the order of acquittal. Learned Magistrate on receipt of the record shall have to then commit the case to the Court of Sessions where after the charged being framed, trial may commence. To prove the possession, the prosecution had to examine panchas. In proceeding before the learned Magistrate be without jurisdiction, panchas have turned hostile. Prosecution has not examined the Investigating Officer before the

Magistrate as it must not have found necessary, as panchas had turned hostile. It is clear from the record that mandatory requirements of Section 41 to 50 of NDPS Act are not satisfied and could not be satisfied by the Investigating Agency; even if the trial is again conducted before the court of sessions. Non-compliance of mandatory requirements as held in the case of Balbirsingh reported in A.I.R. 1944 Supreme Court page 1872 vitiates the trial. In the instant case even on remand once the panchas have turned hostile, they would not depose otherwise before the court of sessions. Even if they support the prosecution then the question would remain as to what extent they can be relied, in view of their earlier version.

Administration of justice could served better by not interfering with the order.

In view of the special facts of this case, no useful purpose will be served by interfering with the order of acquittal. Hence, appeal is dismissed.

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